A

MOHD ASMADI YUSOF

v.

PP

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FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
MOHD GHAZALI YUSOFF FCJ
HELILIAH MOHD YUSOF FCJ
[CRIMINAL APPEAL NO: 05-77-2008 (T)]

C

24 AUGUST 2010

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Ingredients of - Whether sufficient to show knowledge that an act is likely to cause death - Whether prima facie case of murder made out by prosecution - Whether*

D

defence raised any reasonable doubt - Whether prosecution had proved murder beyond reasonable doubt

The appellant was convicted and sentenced to death in the High Court for murder under s. 302 of the Penal Code ('the Code'). His

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appeal to the Court of Appeal was dismissed and the conviction was affirmed. The appellant thus appealed to the Federal Court. In the Federal Court, counsel for the appellant raised only one point. Counsel argued that that no *prima facie* case of murder had been made out against the appellant and that the facts showed that it

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was more a case of culpable homicide not amounting to murder, an offence under s. 304 of the Code.

Held (dismissing the appeal)
Per Mohd Ghazali Yusoff FCJ:

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(1) The totality of the evidence pointed conclusively to the guilt of the appellant. All the ingredients of murder had been proved. The trial judge had religiously followed what was required of him pursuant to ss. 180 and 182A of the Criminal Procedure Code when he called upon the appellant to enter on his

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defence. At the conclusion of the trial, the evidence in its totality confirmed in material particulars that it was the appellant who murdered the victim. *Balachandran v. PP* (refd). (para 15-17)

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(2) Based on the facts and evidence adduced by the prosecution, the court failed to see how an offence of culpable homicide not amounting to murder was possible. The appellant was conscious of what he was doing when he used a brick to hit the head of

the victim. His conduct showed that it was done with absolute callousness towards the result. When a brick or any hard object is used to hit the head of a person, there is a strong probability that it will cause death or such bodily injury as is likely to cause death. The evidence also showed that after the victim fell to the ground upon being hit on the head by the brick, the appellant assaulted him by using his hands and leg. The whole act was wholly inexcusable. (para 18-20)

(3) Clauses (a), (b) and (c) of s. 300 of the Code contemplate 'intention'. In clause (a) it is intention to cause death while in cls. (b) and (c) it is the intention to cause bodily injury. However, 'intention' is not a necessary element in cl. (d) and all that is required to be proved is knowledge that the act is likely to cause death. *Santosh v. The State of Madhya Pradesh* (foll); *Kenneth Fook Mun Lee v. PP* (refd). (para 21)

(4) The trial judge had correctly ruled at the conclusion of the whole trial, that the prosecution had proved its case beyond reasonable doubt. The appellant's defence was merely one of denial. There was no other proof to reasonably dislodge the prosecution's evidence. The trial judge had carefully considered whether the defence had raised a reasonable doubt in the prosecution's case. The trial judge had extensively and correctly appraised the law. All the evidence proved beyond reasonable doubt that the appellant had performed the act knowingly and voluntarily. *Chan Chor Shuh v. PP* (foll); *Ong Ah Too v. Regina* (refd). (paras 22-24)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah disabitkan dan dikenakan hukuman mati dalam Mahkamah Tinggi kerana membunuh di bawah s. 302 Kanun Keseksaan ('Kanun'). Rayuannya ke Mahkamah Rayuan telah ditolak dan sabitannya telah disahkan. Perayu oleh itu merayu ke Mahkamah Persekutuan. Dalam Mahkamah Persekutuan, peguam perayu hanya membangkitkan satu perkara sahaja. Peguam menghujah bahawa tidak ada kes membunuh *prima facie* yang telah dibuktikan terhadap perayu dan fakta-fakta menunjukkan bahawa ia lebih merupakan kes homisid salah yang tidak menjumlah kepada pembunuhan, suatu kesalahan di bawah s. 304 Kanun.

Diputuskan (menolak rayuan)
Oleh Mohd Ghazali Yusoff HMP:

(1) Keseluruhan keterangan membuktikan secara konklusif kebersalahan perayu. Kesemua unsur-unsur pembunuhan telah dibuktikan. Hakim perbicaraan telah melakukan apa yang diperlukan dengan cermat menurut ss. 180 dan 182A Kanun Tatacara Jenayah apabila beliau memanggil perayu untuk memasukkan pembelaannya. Pada kesudahan perbicaraan, keterangan secara keseluruhannya mengesahkan dalam butiran material bahawa perayulah yang telah membunuh mangsa tersebut. *Balachandran v. PP* (dirujuk).

(2) Berdasarkan fakta-fakta dan keterangan yang dikemukakan oleh pendakwaan, mahkamah gagal nampak bagaimana sesuatu kesalahan homisid salah yang tidak menjumlah kepada pembunuhan adalah mungkin. Perayu sedar mengenai apa yang dibuat olehnya semasa beliau menggunakan sebuah bata untuk memukul kepala mangsa. Kelakuannya menunjukkan bahawa ia telah dibuat dengan sifat tidak berperasaan langsung mengenai akibatnya. Apabila sebuah bata atau apa-apa objek padat digunakan untuk memukul kepala seseorang, ada kemungkinan besar bahawa ia akan mengakibatkan kematian atau kecederaan badan yang besar kemungkinannya akan menyebabkan kematian. Keterangan juga membuktikan bahawa selepas mangsa jatuh ke tanah selepas kepalanya dipukul dengan bata, perayu menyerangnya dengan menggunakan tangan dan kakinya. Keseluruhan tindakan tersebut tidak dapat dimaafkan.

(3) Klausa-klausa (a), (b) dan (c) s. 300 Kanun adalah mengenai 'niat'. Dalam klausa (a) ia adalah niat untuk menyebabkan kematian sementara dalam kl. (b) dan (c) ia adalah niat untuk menyebabkan kecederaan badan. Walaupun begitu, 'niat' tidak merupakan elemen yang diperlukan dalam kl. (d) dan apa yang perlu dibuktikan ialah pengetahuan bahawa tindakan tersebut besar kemungkinannya akan mengakibatkan kematian. *Santosh v. The State of Madhya Pradesh* (diikuti); *Kenneth Fook Mun Lee v. PP* (dirujuk).

(4) Hakim perbicaraan telah memutuskan dengan betul pada kesudahan seluruh perbicaraan, bahawa pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Pembelaan perayu hanya merupakan suatu penafian. Tidak ada

bukti lain yang dapat mempertikaikan secara munasabah keterangan pendakwaan. Hakim perbicaraan telah menimbangkan dengan teliti sama ada pembelaan telah menimbulkan keraguan munasabah dalam kes pendakwaan. Hakim perbicaraan telah menilai undang-undang dengan menyeluruh dan betul. Kesemua keterangan membuktikan melampaui keraguan munasabah bahawa perayu telah bertindak begitu dengan penuh kesedaran dan kerelaan. *Chan Chor Shuh v. PP* (diikuti); *Ong Ah Too v. Regina* (dirujuk).

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Chor Shuh v. PP [2003] 1 CLJ 501 CA ***(foll)***
Kenneth Fook Mun Lee v. PP [2006] 4 CLJ 359 FC ***(refd)***
Ong Ah Too v. Regina [1955] 1 LNS 80 HC ***(refd)***
PP v. Ling Tee Huah [1980] 1 LNS 212 ***(refd)***
Santosh v. The State of Madhya Pradesh [1975] Cri LJ 602 ***(foll)***
Vasan Singh v. PP [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180, 182A, 402A(1)
Penal Code, ss. 299, 300(a), (b), (c), (d), 302, 304

Penal Code [Ind], s. 300

For the appellant - Zamani Ibrahim; M/s Zamani Ibrahim
For the respondent - Saiful Edris Zainuddin; AG's Chambers

[Appeal from Court of Appeal; Criminal Appeal No: T05-45-2002]

[Editor's note: For the Court of Appeal judgment, please see Mohd Asmadi Yusof v. PP [2010] 7 CLJ 836.]

Reported by Andrew Christopher Simon

JUDGMENT

Mohd Ghazali Yusoff FCJ:

[1] The appellant was convicted for the murder of one Aswadi bin Mohamad ("the deceased") and was sentenced to death in accordance with s. 302 of the Penal Code ("the Code"). The appellant appealed against his conviction to the Court of Appeal. In a unanimous decision, the appeal was dismissed and the conviction affirmed. The appellant's appeal to this court was also dismissed and the conviction affirmed.

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The Facts

[2] The offence was committed on 2 September 2000 at about 8pm at a night market in Pekan Merchang, Marang Kuala Terengganu. The facts showed that on the night of the incident the
B deceased and his brother PW4 visited a stall selling compact discs which was operated by PW2 and his wife, PW3. PW2 and PW3 then saw the appellant hitting the deceased on his head with a brick. When the deceased fell to the ground the appellant continued attacking the deceased with his hands and legs. The appellant then
C ran away. PW4, who knew the appellant, also witnessed the incident.

[3] The deceased was then taken to the Terengganu Hospital for treatment. PW16, the doctor who treated the deceased testified that the deceased was in a coma when he was brought in and that an
D x-ray of the head revealed a fracture of the right temporal bone. He further testified that the deceased was in a critical condition at that material time and opined that he had a slim chance of survival. The deceased succumbed to his injuries and died on 6 September 2000.
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[4] PW5, the pathologist who performed a post-mortem on the deceased confirmed that the cause of death was due to severe head injuries resulting from being struck hard on the head by a blunt object.
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[5] On 10 September 2000 at about 9.15pm the appellant surrendered himself at the Merchang police station. He was subsequently charged with the offence of murder.

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The High Court

[6] At the conclusion of the case for the prosecution, the learned trial judge, Nik Hashim Ab Rahman J (as he then was) ruled that the prosecution has made out a *prima facie* case against the appellant on the offence charged and consequently called upon the
H appellant to enter on his defence. In his grounds of judgment, the trial judge said:

> Keterangan yang ada pada peringkat ini adalah sudah memadai dan saya berpuashati bahawa pihak pendakwa telah berjaya
I mewujudkan suatu kes *prima facie* terhadap OKT bahwa OKT telah melakukan kesalahan membunuh ke atas simati seperti ditakrifkan di bawah seksyen 300(a), (c) dan (d) KK. Oleh itu, OKT dipanggil untuk membela diri.

[7] The appellant elected to give evidence on oath. He testified that on the day of the incident, ie, 2 September 2000 he was in Mersing. He claimed that he was not aware that the deceased was assaulted on the day of the incident and neither would he know the assailant. He denied that he was at the scene on the day of the incident. He further denied that he was the person who assaulted the deceased on the day of the incident. He insisted that he only came to know of the incident when his brother, Mohd Noor bin Yusof contacted him by telephone and informed that the police was looking for him. Acting on that information, he returned to Merchang and surrendered to the police on 10 September 2000.

[8] Under cross-examination, the appellant identified the deceased from a photograph shown to him by the prosecuting officer. He admitted that he had in the past once quarreled with the deceased over a purchase of drugs and in the course of that quarrel the deceased attacked him with a golok.

[9] At the conclusion of the trial, after considering all the evidence before him, the trial judge found that the prosecution has proved its case beyond reasonable doubt and consequently found the appellant guilty of the offence of murder as charged and convicted him.

[10] In his grounds of judgment the trial judge took into consideration that no notice of *alibi* was given pursuant to s. 402A(1) of the Criminal Procedure Code (CPC). In relation to this he referred to *Vasan Singh v. PP* [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166. He also referred to *Public Prosecutor v. Ling Tee Huah* [1980] 1 LNS 212 where the accused's defence was one of denial. In *Ling Tee Huah* the court held that a mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient. The appellant appealed to the Court of Appeal.

The Court Of Appeal

[11] In dismissing the appeal, the Court of Appeal was satisfied that the trial judge had undertaken a maximum evaluation of the evidence adduced at the conclusion of the case for the prosecution and had applied the right principles when he ruled that the prosecution has made out a *prima facie* case against the appellant on the offence charged.

[12] On the defence of *alibi* proferred during the defence case, the Court of Appeal was of the view that the trial judge "correctly came to the conclusion that there was no supporting evidence on the accused's *alibi* defence" and further that "the failure to give such notice under s. 402A(1) of the CPC would render the evidence in support to be inadmissible". The appellant appealed to this court.

The Appeal Before This Court

[13] Before this court, learned counsel for the appellant raised only one point. He argued that no *prima facie* case had been made against the appellant under s. 302 of the Code as per charge and that the facts showed that it was more a case of an offence under s. 304 of the Code, *viz.*, culpable homicide not amounting to murder.

Judgment Of This Court

[14] The appellant was charged with murder and hence the prosecution must prove the following ingredients:

(i) that the death of the deceased, Aswadi bin Mohamad had taken place;

(ii) that his death had been caused by or in consequence of the act of the appellant; and

(iii) such act was done with the intention either of causing death or of causing bodily injury sufficient in the ordinary course of nature to have caused his death.

[15] We were of the unanimous view that the totality of the evidence pointed conclusively to the guilt of the appellant. All the ingredients have been proved. In his grounds of judgment the trial judge, after laying down the evidence of the various witnesses in detail and highlighting his perception of the facts before him, found that a *prima facie* case has been made out against the appellant on the offence charged, ie, murder under s. 302 of the Code and hence called upon the appellant to enter on his defence.

[16] The appellant elected to give evidence on oath. At the conclusion of the trial the trial judge found that the prosecution has proved its case beyond reasonable doubt and found the appellant guilty of the offence of murder as charged and convicted him.

[17] After a careful perusal of the appeal record and the trial judge's grounds of judgment we cannot see any merits in this appeal. The learned trial judge has religiously followed what was required of him pursuant to ss. 180 and 182A of the CPC when he called upon the appellant to enter on his defence (see *Balachandran v. Public Prosecutor* [2005] 1 CLJ 85 at pp. 99-100). At the conclusion of the trial, the evidence in its totality confirmed in material particulars that it was the appellant who murdered the deceased.

[18] As discussed earlier, counsel for the appellant raised only one issue, *viz.*, that no *prima facie* case had been made against the appellant under s. 302 of the Code as per charge and that the facts showed that it was more a case of an offence under s. 304 of the Code, *viz.*, culpable homicide not amounting to murder. We cannot see how that could be possible premised on the facts and evidence adduced by the prosecution.

[19] At the conclusion of the case for the prosecution, the trial judge found that the prosecution had made out a *prima facie* case of murder as defined under s. 300(a), (c) and (d) of the Code and hence called upon the appellant to enter on his defence. Section 300 of the Code reads:

> Except in the cases hereinafter excepted, **culpable homicide is murder**:
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> (a) if the act by which the death is caused is done with the **intention** of causing death;
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> (b) if it is done with the **intention** of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
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> (c) if it is done with the **intention** of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
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> (d) if the person committing the act **knows** that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid. (emphasis added)

[20] The facts showed that the appellant was conscious of what he was doing when he used the brick to hit the head of the deceased. His conduct showed that it was done with absolute callousness

towards the result. We are of the view that when a brick or any hard object is used to hit the head of a person, there is a strong probability that it will cause death or such bodily injury as is likely to cause death. It is an evident risk to human life. It amounts to an act which is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death. The evidence also showed that after the deceased fell to the ground upon being hit on the head by the brick, the appellant assaulted him by using his hands and leg. We would think that the whole act was wholly inexcusable.

[21] Section 299 of the Code defines culpable homicide and it reads:

> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits an offence of culpable homicide.

Clauses (a), (b) and (c) of s. 300 of the Code contemplate 'intention' and in clause (a) it is intention to cause death while in clauses (b) and (c) it is intention to cause bodily injury. On the other hand, 'intention' is not a necessary element in clause (d) and all that is required to be proved is knowledge that the act is likely to cause death. In *Santosh v. The State of Madhya Pradesh* [1975] Cri. LJ 602, in dealing with s. 300 of the Indian Penal Code, Beg J held (at p. 603) as follows:

> An intention to kill is not required in every case. A knowledge that the natural and probable consequences of an act would be death will suffice for a conviction under Section 302, IPC.

(See also *Kenneth Fook Mun Lee v. PP* [2006] 4 CLJ 359.)

[22] Section 180 of the CPC provides that when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused and if the court finds a *prima facie* case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence. Looking at the facts of the instant appeal, we cannot see how the trial judge could have ruled otherwise. Consequently, s. 182A of the CPC provides that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has

proved its case beyond reasonable doubt. In the instant appeal the trial judge ruled at the conclusion of the trial that the prosecution has proved its case beyond reasonable doubt. It is our view that he has made the correct decision under the circumstance of this case. The defence was one of denial. There was no other proof to reasonably dislodge the prosecution's evidence.

[23] In *Chan Chor Shuh v. PP* [2003] 1 CLJ 501 this court held that the law requires the trial judge to consider all the evidence that has been adduced in support of the defence and that a court must consider carefully whether a defence put forward is capable of raising a reasonable doubt in the prosecution's case. In the instant appeal, the trial judge has done that and as such we find no reason to disturb his finding. We are aware that it is a salutary rule of law that the failure to consider a possible legal defence is a miscarriage of justice (see *Ong Ah Too v. Regina* [1955] 1 LNS 80). In the instant appeal, we cannot see any possibility that that there was a miscarriage of justice.

[24] On the whole, we were of the view that the trial judge was correct in finding the appellant guilty of murder. It was established beyond reasonable doubt that the appellant caused the death of the deceased. In arriving at that decision the trial judge had extensively and correctly appraised the law. All the evidence proved beyond doubt that the appellant had performed the act knowingly and voluntarily. It is for these reasons that we dismissed the appeal and affirmed the conviction and sentence.